92-571

Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1992

PAINEWEBBER INCORPORATED,

Petitioner,

v.

BANKATLANTIC,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. May an appellate court, upon review of a district court order which summarily disposed of claims prior to trial, uphold the judgment based on evidence which was not part of the record before the district court at the time the order was rendered.

2. Whether contractual alternative dispute remedies are inapplicable to tort claims predicted on contractual breach.

PARTIES TO THE PROCEEDING

Petitioner is PaineWebber Incorporated.

Respondent is BankAtlantic, a federal savings bank.

DESIGNATION OF CORPORATE RELATIONSHIPS

A list of all parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates of Petitioner PaineWebber Incorporated, and of each such corporation, is included in the Appendix which accompanies this Petition at A-132.[1]

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[1] References to PaineWebber Incorporated's Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, filed contemporaneously herewith, are cited herein as "A- ."

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, PaineWebber Incorporated (hereinafter "PaineWebber"),[2] requests that a writ of certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit.

[2] The named defendant, Blythe Eastman Paine Webber, Inc. is now PaineWebber Incorporated.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 955 F.2d 1467 (11th Cir. 1992) and is set out in the Appendix to this petition at A-3. The orders of the district court granting BankAtlantic, a federal savings bank (hereinafter "BankAtlantic"),[3] judgment on the pleadings dismissing PaineWebber's counterclaim, and denying PaineWebber's motion for reconsideration, entered on October 10, 1989 and January 19, 1990 respectively, are included in the Appendix at A-50 and A-35.

JURISDICTION

The opinion of the Court of Appeals for which certiorari is sought was entered on March 23, 1992. 955 F.2d 1467 (11th Cir. 1992). A-3. On July 2, 1992, the Court of Appeals denied the petition for rehearing filed by BankAtlantic. A-1.

This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. §1254(1). The petition is timely under 28 U.S.C. §2101(c) and Rules 13.1 and 13.4 of this Court.

STATUTES INVOLVED

Federal Rule of Civil Procedure 12(c) provides:

> (c) **Motion for Judgment on the Pleadings.** After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be

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[3] BankAtlantic was known as Atlantic Federal Savings & Loan Association at the time this litigation was commenced.

treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

STATEMENT OF THE CASE

PaineWebber is a financial services company incorporated and located in New York. BankAtlantic is a federal savings and loan association located in Fort Lauderdale, Florida. At the time of this litigation, BankAtlantic was one of the largest savings and loan institutions in Florida and in the United States.

In 1984, BankAtlantic retained PaineWebber as a financial advisor and to assist it in blocking several hostile takeover attempts. The parties entered a financial advisor agreement which was negotiated between them with each represented by its counsel. A-9-10; A-72-82.

Based on PaineWebber's recommendation, BankAtlantic entered into two interest rate swaps[4] with Homestead Savings & Loan Association of California in an effort to hedge its adjustable rate deposit payables against an increase in interest rates. PaineWebber served as broker in the two interest rate swaps. A-9-10.

Alleging non-performance under the agreement, BankAtlantic terminated the services of PaineWebber as financial advisor and employed another firm to assist with the interest rate swaps. During this time, interest rates were falling drastically. A-10.

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[4] An interest rate swap is an agreement by which one party agrees to pay the counterparty a fixed rate of interest on a notional amount for a specified period of time. In return, the counterparty agrees to pay the first party an adjustable rate of interest on the same notional amount for the same period of time.

After PaineWebber was terminated, the corporate raider PaineWebber was hired to keep out gained control of BankAtlantic. In August 1987, BankAtlantic, now under its new management, brought suit against PaineWebber alleging that losses of $30 million were caused by PaineWebber's alleged failure to disclose the risks involved in interest rate swaps, e.g., that if interest rates fell, the high yielding fixed rate mortgages would be prepaid as borrowers refinanced. A-10. The complaint alleged breach of contract,[5] breach of fiduciary duty, fraud, fraudulent concealment, negligence, and negligent misrepresentation. Id.; A-93-100. All claims were based upon or arose out of the financial advisor agreement which was attached as an exhibit to the complaint and was incorporated into each claim. A-105. The district court had jurisdiction pursuant to 28 U.S.C. §1332.

PaineWebber served its answer denying liability and filed a counterclaim for recovery of fees and costs as provided by the indemnification provisions of the financial advisor agreement. A-10, 66. The counterclaim alleged that BankAtlantic's lawsuit triggered the agreement's indemnity provisions and shifted the economic risks of any such action from PaineWebber to BankAtlantic. A-70. The indemnity provides that BankAtlantic will "reimburse [PaineWebber] for any reasonable expenses incurred (including reasonable fees and disbursements of counsel) in connection with the . . . defense of any formal or informal claim, action, investigation or other proceeding caused by or arising out of or in connection with [PaineWebber's] acting pursuant to the [agreement]. . . ." A-79-80.

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[5] BankAtlantic abandoned its breach of contract claim during trial and the district court later dismissed that claim with prejudice.

BankAtlantic filed a motion for judgment on the pleadings with respect to PaineWebber's counterclaim which was granted by the district court. A-10, 52. The district court dismissed the counterclaim ruling that while the indemnity shifted liability, it only did so as to third party claims. A-52. Such intention was contradicted by the pleadings, especially PaineWebber's counterclaim. A-66.

On November 13, 1989, after a five-week trial, the jury returned a verdict in favor of PaineWebber on all claims. A-10, 40. Neither the district court nor the jury ever made a finding that the interest rate swaps were outside the scope of the financial advisor agreement. At all times, plaintiff argued successfully that the swaps were encompassed by the agreement. *See* A-46.

In February 1990, BankAtlantic appealed from the final judgment in favor of PaineWebber. PaineWebber appealed from the dismissal of its counterclaim. The appeals were consolidated. The Eleventh Circuit had jurisdiction pursuant to 28 U.S.C. §1291. On March 23, 1992, the Eleventh Circuit rendered its opinion and judgment reported at 955 F.2d 1467. A-3.

In its main brief on appeal, BankAtlantic continued to argue the legal theory that all of its claims against PaineWebber arose out of and were dependent on the financial advisor agreement. PaineWebber, in its answer brief, maintained that BankAtlantic's entire appeal was moot because any claim BankAtlantic pursued at trial and on appeal was barred under Florida's economic loss rule or independent tort doctrine. In the absence of personal injury or property damage, Florida bars tort claims solely for economic losses. *See AFM Corp. v. Southern Bell Tel. & Tel. Co.*, 515 So. 2d 180 (Fla. 1987); *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 510 So. 2d 899 (Fla. 1987). Florida's rule is premised on

this Court's decision in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986). *Id.* The Eleventh Circuit applied the *AFM* doctrine in *Interstate Securities Corp. v. Hayes Corp.*, 920 F.2d 769 (11th Cir. 1991).

In its reply brief, BankAtlantic changed its position and for the first time argued that the two interest rate swaps were not encompassed in the financial advisor agreement. The Eleventh Circuit held that *Interstate Securities* did not bar BankAtlantic's tort claims, because the interest rate swaps were outside the scope of the contract, and consequently, its indemnity provisions. A-26.

The Eleventh Circuit considered and relied upon factual issues and evidence presented during trial in order to affirm the dismissal rendered prior to trial. The appellate court held that PaineWebber's arguments regarding the evidence at trial made in response to BankAtlantic's j.n.o.v. motion justified the pretrial dismissal. A-26, 28-29.

The appellate court did not comment on the allegations of the pleadings which were directly contrary to the position the court adopted to affirm the dismissal. The opinion conflicts with the other circuits and this Court both in the construction and application of Rule 12(c), and the jurisdictional limitations on an appellate court's ability to consider an argument first made on appeal. The majority of circuits prohibit appellate review of materials not of record at the time of a pretrial adjudication.

The Eleventh Circuit's opinion is squarely at odds with Florida law set out in *AFM Corp. v. Southern Bell Telephone & Telegraph Co.*, 515 So. 2d 180, which was based on this Court's decision in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, and applied in *Interstate Securities Corp. v. Hayes Corp.*, 920 F.2d 769.

REASONS FOR ALLOWING THE WRIT

I. THE ELEVENTH CIRCUIT'S HOLDING THAT IT COULD AFFIRM A SUMMARY DISMISSAL BASED ON FACTS AND THEORIES WHICH WERE NEITHER PART OF THE PLEADINGS NOR BEFORE THE DISTRICT COURT AT THE TIME THE DISMISSAL WAS RENDERED IS IN DIRECT CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS, AND IS INCONSISTENT WITH SUPREME COURT PRECEDENT.

The Eleventh Circuit's holding that it could affirm a pretrial dismissal based upon material which was not of record at the time of the trial court's order, conflicts with the majority of circuits, and is contrary to opinions of this Court. The majority of circuits hold that appellate review of pretrial dismissals is limited to the material of record at the time of the district court's ruling. *See Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915-16 (5th Cir. 1991) (court of appeals may not consider evidence or arguments not presented to district court for district court's consideration in ruling on the motion), *petition for cert. filed*, 61 U.S.L.W. 3005 (June 24, 1992); *Catrett v. Johns-Manville Sales Corp.*, 826 F.2d 33, 37 (D.C. Cir. 1987) ("Our sole and limited task is to assess with care the record before the District Court at the time it granted Celotex's summary judgment motion and to determine whether that ruling was proper in light of the state of the record at that juncture"), *cert. denied*, 484 U.S. 1066 (1988); *Glaros v. H. H. Robertson Co.*, 797 F.2d 1564, 1568-69 (Fed. Cir. 1986) ("To succeed on appeal, [appellant] must show that he did submit such evidence *before* summary judgment was granted"), *cert. dismissed*, 479 U.S. 1072 (1987); *Voutour v. Vitale*, 761 F.2d 812, 817 (1st Cir. 1985) ("Our review is confined to an examination of the

materials before the court at the time the rulings were made. Neither the evidence offered subsequently at the trial nor the verdict is relevant."), *cert. denied*, 474 U.S. 1100 (1986); *Dictograph Prods. Co. v. Sonotone Corp.*, 231 F.2d 867, 867-68 (2d Cir.) (appellate court has no "jurisdiction" to consider depositions or other evidence not filed in the district court when the motion was decided), *cert. dismissed*, 352 U.S. 883 (1956); *Harkins Amusement Enters., Inc. v. General Cinema Corp.*, 850 F.2d 477, 482 (9th Cir. 1988) ("the relevant record on review of summary judgments is the record as it existed at the time the motion was considered); *see Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 n.16 (1970) (statement "not in the record of the proceedings below and therefore could not have been considered by the trial court. Manifestly, it cannot be properly considered by us in the disposition of the case").

The Eleventh and Third Circuits hold to the contrary and permit consideration of evidence not before the district court at the time of its disposition. *See Sammons v. Taylor*, 967 F.2d 1533, 1544 (11th Cir. 1992) (appellate court is not jurisdictionally barred from considering evidence and arguments not presented to district court); *Ford Motor Co. v. Summit Motor Prods., Inc.*, 930 F.2d 277, 285 (3d Cir.) (appellate court will "consider any additional evidence in the record before [it], even though that evidence may have been submitted to the district court after it had ruled on [counterdefendant's] motion . . . ."), *cert. denied*, 112 S. Ct. 373 (1991).

This Court also should grant certiorari because of the compelling importance of the issue presented.[6] The decisions of this Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), have increased the number of pretrial dispositions on their merits. An instructive opinion to the circuit courts of appeals as to the jurisdictional limitations on review of such dispositions is essential.

The dismissal on the pleadings was entered prior to trial, and as such the only material that the district court legally could review was the pleadings, consisting of the complaint, answer, counterclaim, and answer to the counterclaim. The appellate court in its *de novo* review did not restrict itself to the pleadings. Instead, the court based its ruling on post-trial arguments and evidence presented during trial such as PaineWebber's memorandum in opposition to BankAtlantic's motion for a j.n.o.v.

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[6] The issue poses a recurring question that this Court should resolve. For example, this Court has pending before it a petition asking the related question, whether a district court or appellate court, when considering a summary judgment motion, must examine all evidence in the record at the time of the order's disposition, even if not mentioned by the parties. Skotak v. Tenneco Resins, Inc., 61 U.S.L.W. 3005 (U.S. June 24, 1992).

In order to preserve the losing party's rights on appeal, appellate courts must be limited to review for error in the record as it existed before the trial court at the time its decision was rendered.[7] An appellate court "has no jurisdiction save to correct errors, and it cannot be an error to ignore evidence never presented to the [district] court." *Dictograph*, 231 F.2d at 867. If the appellate court is allowed to become the initial arbiter of fact and law by considering materials not before the district court, then it will have usurped the trial court's function. The reviewing court, which is not intimately familiar with the facts and issues of the case, "cannot be the trier of facts, and particularly it cannot decide a question of fact upon evidence which is not in the record. [The appellate court] cannot make findings of fact different from the allegations of the pleadings and affidavits upon which summary judgment or dismissal was entered below." *Carr v. Corning*, 182 F.2d 14, 21 (D.C. Cir. 1950). The reviewing court must be limited to the record before the district court at the time of its decision.

II. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THE FLORIDA SUPREME COURT HOLDING THAT A PARTY TO A CONTRACT MAY NOT SUE IN TORT FOR RECOVERY OF AN ECONOMIC LOSS AND IS CONTRARY TO NATIONAL POLICY WHICH FAVORS CONTRACTUAL ALLOCATION OF RISK,

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[7] In the case of Rule 12(b)(6) and 12(c) motions, because only pleadings were properly before the trial court, the appellate court's review must also be limited to the pleadings, which must be accepted as true. United States v. Gaubert, 111 S. Ct. 1267, 1276 (1991); Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984); Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). Accordingly, the Eleventh Circuit's consideration of outside materials and failure to accept the allegations of PaineWebber's counterclaim as true is error.

RESPONSIBILITY, AND COMPENSATION BY COMMERCIAL ENTITIES.

The Eleventh Circuit also affirmed the judgment in favor of BankAtlantic on PaineWebber's counterclaim by holding that BankAtlantic could sue in tort for economic damages flowing from an alleged contractual breach. This holding served as the Court's justification for its refusal to permit PaineWebber to recover its attorneys' fees and costs, as agreed to by BankAtlantic in the financial advisor agreement. The Eleventh Circuit's holding that BankAtlantic could sue in tort for these economic losses, and ignore the agreed to contractual remedies, is contrary to the holdings of the Supreme Court of Florida and this Court. The decision also greatly departs from the usual course of judicial proceedings, and from public policy, which encourage alternative dispute resolution mechanisms. If left to stand, the decision would render meaningless contractual alternative dispute resolution mechanisms, by permitting a plaintiff to cloak its claims in tort to recover damages for a contractual breach.

A. The Opinion Recedes From the Economic Loss Rule

The purpose of the economic loss rule is to further the public policy of permitting parties to a contract to allocate their economic risks by agreement. The economic loss rule in Florida is predicated upon this Court's holding in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986), and was announced in two decisions of the Florida Supreme Court. *See Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 510 So. 2d 899 (Fla. 1987); *AFM Corp. v. Southern Bell Tel. & Tel. Co.*, 515 So. 2d 180 (Fla. 1987). The decisions hold that there can be no recovery in tort for damages flowing from a contractual breach, absent personal injury or property

damage. In announcing the rule, the Florida Supreme Court held that "contract principles are more appropriate than tort principles to resolve purely economic loss claims." 510 So. 2d at 901.

The rule was adopted by the Florida Supreme Court in *Florida Power & Light v. Westinghouse.* There, an electric utility sued the manufacturer of six steam generators for breach of warranty and negligence. *Id.* The defendant sought and obtained summary judgment on the negligence claims by arguing that, absent personal injury or property damage, the utility was limited to its claims under the parties' contract.

The Florida Supreme Court affirmed the summary judgment entered. In so doing, it relied upon and adopted this Court's decision in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986). The Florida Supreme Court held the parties should be limited to their agreed contractual remedies, because this "encourage[d] parties to negotiate economic risks through warranty provisions and price." 510 So. 2d at 901. The court stated that it could find no public policy basis for intruding upon the parties' allocation of risk by contract:

> [T]he purchaser, particularly in a large commercial transaction like the instant case, can protect his interest by negotiation and contractual bargaining or insurance. The purchaser has the choice to forego warranty protection in order to obtain a lower price. We conclude that we should refrain from injecting the judiciary into this type of economic decision-making.

510 So. 2d at 902.

In *East River,* this Court held that contract law, as opposed to tort law, is better suited to commercial controversies, "because the parties may set the terms of their

own agreements." 476 U.S. at 872-73. *East River* was brought by charterers of supertankers seeking to recover the cost of turbine repairs from the turbines' manufacturers. The claims sounded in both contract and tort. This Court rejected the imposition of tort liability, because the parties had agreed to contractual remedies, and there was no injury to persons or property. This Court noted that, in exchange for the limitation on remedies, the purchaser paid less for the manufacturers' product. Therefore, this Court concluded that "we see no reason to intrude into the parties' allocation of the risk." *Id.* at 873.

The Florida Supreme Court's holding in *Florida Power* was extended in *AFM Corp. v. Southern Bell*, 515 So. 2d 180, to cases involving a breach of contract for services. The case was certified to the Florida Supreme Court by the Eleventh Circuit Court of Appeals on the following question:

> Does Florida permit a purchaser of services to recover economic losses in tort without a claim for personal injury or property damage?

515 So. 2d at 180. The court answered the question in the negative. *Id.*

In *AFM*, the Florida Supreme Court extended the doctrine to services. Southern Bell mistakenly rerouted telephone calls directed to AFM. AFM lost substantial business and sued Southern Bell "solely on a tort theory . . . and specifically announced that it was not basing its tort theory on any agreement between the parties." *Id.* at 181. The Florida Supreme Court extended the *Florida Power* decision to a contract for services, and held:

> [W]ithout some conduct resulting in personal injury or property damage, there can be no independent tort flowing from a contractual

> breach which would justify a tort claim solely for economic losses.

Id. at 181-82.[8] The court reiterated the superiority of contractual remedies in such circumstances noting that:

> The contract defined the limitation of liability through bargaining, risk acceptance, and compensation.

Id. at 181.

In this case, there was no personal injury or property damage to BankAtlantic, and therefore no basis for recovery in tort. The parties had allocated their risks in the financial advisor agreement which contained an indemnity provision. The Eleventh Circuit nevertheless held that viable tort claims which stemmed from the breach of a contract existed and therefore refused to enforce the indemnity provision.

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[8] The Eleventh Circuit expressly recognized the status of Florida law in this area in its decision in Interstate Securities Corp. v. Hayes Corp., 920 F.2d 769 (11th Cir. 1991). Nevertheless, in the instant case, the Eleventh Circuit held contrary to *Interstate Securities.*

In *Interstate Securities*, customers of a securities broker sued the broker for breach of contract, negligence, and breach of fiduciary duty in the handling of their options and commodities account. As in *AFM* (and as in this case), the breach of contract claim was abandoned by the plaintiff. *Id.* at 772. The trial court directed a verdict for the broker on the negligence claim on the authority of *AFM*, 547 So. 2d 180. *Interstate Securities*, 920 F.2d at 772. The trial court, however, allowed the breach of fiduciary duty claim to go to the jury. The jury returned a verdict in favor of the broker, and the customers appealed. *Id.* at 773. On appeal, the Eleventh Circuit affirmed "the district court's holding that the *AFM* doctrine bars [the customers'] negligence claims" and further "that *AFM* also bars the claims regarding breach of fiduciary duty." *Id.* The Eleventh Circuit explained that when parties have defined their relationship and respective duties by a contract, no tort claims lie absent property damage "outside the scope of the contract between the parties." *Id.* at 775. In the present case, another panel of the Eleventh Circuit held contrary to this rule.

B. The Eleventh Circuit's Opinion Is Contrary to National Policy Which Fosters Alternative Dispute Resolution Including the Use of Contractual Remedies

The Eleventh Circuit's opinion, if left to stand, would render meaningless contractual provisions requiring alternative dispute resolution. The door would re-open the floodgates of tort claims designed to circumvent contractual provisions which limit liability, allocate economic risks, and provide for alternative dispute reso'ution mechanisms.

America is experiencing a "litigation explosion" that is crippling the federal civil docket. Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A.J. 274, 275 (1982). The United States Court of Appeals for the First Circuit characterized the civil docket as being in a state of "rampant growth" and "hypertrophy":

> [A] pathological "overgrowth . . . of an organ or part . . . resulting from unusually steady or severe use."

Securities Indus. Ass'n v. Conolly, 883 F.2d 1114, 1116 (1st Cir. 1989) (citing Webster's Third New World Dictionary 114 (1981)).

In 1989, almost 18 million new civil cases were filed in state and federal courts — "one lawsuit for every ten adults." President's Council on Competitiveness, *Agenda for Civil Justice Reform in America* 1 (1991) [hereinafter President's Council]. In the last 30 years, the number of lawsuits filed each year in the federal courts has tripled. *Id.*

This litigation explosion has not been without its costs. Individuals, business, and governments have spent "a total of up to $300 billion" on direct and indirect litigation costs. *Id.* More importantly, "the civil justice

system as we know it today is not fulfilling its basic objective of providing the 'just, speedy and inexpensive' resolutions of disputes." S. Rep. No. 416, 101st Cong., 2d Sess. 7 (1990) (citing Fed. R. Civ. P. 1).

As a result, the judicial system has been under attack from all quarters. Vice President Quayle warned:

> The costs of [the litigation explosion] are immense, not only for the individuals who find themselves in court, but for American business and the economy at large. And, the problem poses a long-run threat to public confidence in our legal system.

Vice President Dan Quayle, Address Before the Ninth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, 140 F.R.D. 137 (1991). Laurence H. Silberman, former deputy attorney general of the United States, likewise has stated:

> The legal process, because of its unbridled growth, has become a cancer which threatens the vitality of our forms of capitalism and democracy.

Lawrence H. Silberman, *Will Lawyering Strangle Democratic Capitalism?*, Regulation, Mar.-Apr. 1978, at 15. Another commentator observed:

> In recent years the federal courts have been increasingly mired in congestion, delay, and high litigation costs .... Indeed, by 1983 these problems had become severe enough to raise questions about the viability of the federal civil justice system and even the continuing worth of the Federal Rules.

. . . .

> . . . [The] system [is] so indulgent of dubious claims, defenses, and behavior that it fell prey to adversarial ethics, crowded dockets, rising litigation costs, abusive discovery, and holdup litigation.

Martin B. Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of Civil Procedure,* 67 N.C.L. Rev. 1023, 1023-24, 1028-29 (1989) (citations omitted) [hereinafter Louis].[9]

In response to this criticism, former Chief Justice Burger stated:

> "With court congestion and excessive litigiousness drawing increasing criticism, it is clear that lawyers in the future will have to be trained to explore nonjudicial routes to resolving disputes."

Warren E. Burger, *Isn't There a Better Way,* 68 A.B.A.J. 274, 275 (1982) (citation omitted).

Commentators, politicians, and interest groups have recommended a panoply of reforms to address the problem. Louis, *supra.* The President's Council on Competitiveness has recommended an array of reforms including promoting voluntary dispute resolution and adopting a "loser pays" rule for attorneys' fees in diversity cases. President's Council at 7, 8-9, 15, 24-25.

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[9] Judge Bork observed: "we are thrusting a workload upon the courts that forces them towards an assembly line model." Robert H. Bork, Dealing with the Overload in Article III Courts, Address Before the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 70 F.R.D. 231 (1976).

The problem is so acute that Congress enacted the Civil Justice Reform Act, 28 U.S.C. §§471-82 (1992). The Act requires the district courts to implement a civil justice expense and delay reduction plan to address the problems resulting from the litigation explosion. 28 U.S.C. §471. One of the "cornerstone principles" of the Act is "expanding and enhancing the use of alternative dispute resolution." S. Rep. No. 416, 101st Cong., 2d Sess. 14 (1990). Senator Joseph Biden, Chairman of the Senate Judiciary Committee, commented: "We need this legislation to establish a *statutory national policy* for addressing the problems of litigation costs and delay . . . ." *Id.* at 31 (emphasis added).

The courts already have many tools available to them to stem the litigation explosion, including some of those that have been recommended. The enforcement of arbitration agreements is one means by which courts may curtail their ever increasing caseload. Indeed, federal policy strongly favors arbitration as an alternative dispute resolution process. *Rodriguez De Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Wilko v. Swan*, 346 U.S. 427, 431-32 (1953), *overruled on other grounds, Rodriguez*, 490 U.S. 477 ("The United States Arbitration Act establishes the desirability of arbitration as an alternative to the complications of litigation") (citing H.R. Rep. No. 96, 68th Cong., 1st Sess. 1-2; S. Rep. No. 536, 68th Cong., 1st Sess. 3); *David L. Threlkeld & Co. v. Metallgesellschaft Ltd.*, 923 F.2d 245, 248 (2d Cir. 1991). Arbitration is "a contractual device that relieves some of the organic pressure [of the growing civil docket] by operating as a shunt, allowing the parties to resolve disputes outside of the legal system." *Securities*, 883 F.2d at 1116.

The federal courts also are armed with Rule 11 to sanction and deter frivolous lawsuits. In this regard, this Court has held:

> It is now clear that the central purpose of Rule 11 is to deter baseless filings in District Court and thus . . . streamline the administration and procedure of the federal courts.

Cooter & Gell v. Hartmarx, 496 U.S. 384 (1990).

Rule 68, similar to indemnification, allows for the shifting of the prevailing party's costs, and in some cases fees, to the losing party. Indeed, this Court has emphasized the deterrent value of forcing the losing party to indemnify the prevailing party for the costs and fees that it incurs:

> To be sure, application of Rule 68 will require plaintiffs to "think very hard" about whether continued litigation is worthwhile; that is precisely what Rule 68 contemplates.

Marek v. Chesny, 473 U.S. 1, 11 (1985).

The enforcement of contracts additionally deters baseless filings. Commentators have observed that the failure of some courts to enforce contracts has contributed significantly to the litigation explosion:

> The death of contract (as Gilmore famously called it) was full of implications for the sense of individual responsibility. If courts no longer thought it as important as they once did that people live up to their solemn promises, at least when the promise in question was a promise not to litigate in some way, people would themselves come to attach less importance to choice and agreement as sources of rights. And the major

source of rights other than choice and agreement is the litigation industry.

> The death of contract was of broad significance for the litigation explosion in another way as well. The self-correcting tendency, the resilience, of the old legal system had been undercut; a penny had been put in the fuse box. Henceforth lawyers could ask courts not only to decree a vague duty or a procedural imposition, but to squash all responsive attempts to provide specificity to the new duty or waive the burdensome procedure. The last and most important exit was now closed.

Walter K. Olson, *The Litigation Explosion: What Happened When America Unleashed The Lawsuit*, 218-19 (1991).[10]

The independent tort doctrine and the economic loss rule are designed to preclude tort claims where the action arises out of a contractual relationship. Moreover, the economic loss rule holds that such actions should be governed by contract, rather than tort, principles thereby allowing the parties to negotiate the economic ramifications of a breach of their agreement.

Courts could stem the litigation explosion, and the resulting criticism, by utilizing the tools available to them. This case manifests in microcosm the failure of some courts to address this crisis and discourage the

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[10] The decline in contract law additionally has burdened the American economy. "[T]here are tremendous problems with substantive law, problems that undermine our competitiveness. For example, much has been written about the decline of contract law. One author wrote some years ago about the death of contract and the rise of tort litigation in its place." Dan Quayle, Address Before the Ninth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, 140 F.R.D. 137, 139 (1991).

filing of frivolous claims — thereby adding to the already overcrowded federal civil docket.

In short, the district court failed to enforce the contracts negotiated by the sophisticated parties involved in this action. PaineWebber filed a motion to dismiss, and later, a motion for summary judgment on BankAtlantic's tort claims on the basis of the independent tort doctrine and the economic loss rule. The district court denied PaineWebber's motions. A-83, 54.

Subsequently, the district court and the Eleventh Circuit denied PaineWebber's contractual right to indemnification. A-51-52, 28-29. The indemnification agreement was negotiated between two sophisticated parties. The purpose of the indemnification agreement was to deter actions by successful corporate raiders, such as BankAtlantic and its chairman, Alan Levan.

As a result of the district court's failure to enforce the contract by not applying the economic loss rule and refusing indemnification, scarce judicial resources were wasted during the five week jury trial of this action. Not surprisingly, the jury responded by denying each of BankAtlantic's claims exclaiming that the action was "frivolous" and that they "were sorry to see the case in court."

After BankAtlantic's officers admitted at trial that BankAtlantic had not suffered any loss or damage, and its senior management acknowledged that they were fully aware of the "risks" associated with the interest rate swaps, PaineWebber requested that the district court enter Rule 11 sanctions. Despite this testimony revealing that BankAtlantic knew that its claims were frivolous, the district court denied PaineWebber's motion. A-32.

The enforcement of PaineWebber's contractual right to indemnification, much like the operation of Rule 11 and

Rule 68, would have caused BankAtlantic, and future potential plaintiff's, to "think very hard" about whether to bring contrived actions. *Marek v. Chesny*, 473 U.S. 1, 11 (1985); *see also Cooter & Gell v. Hartmarx*, 496 U.S. 384 (1990) ("central purpose of Rule 11 is to deter baseless filings in District Court and thus . . . streamline the administration and procedure of the federal courts").

Pursuant to the Civil Justice Reform Act, there is a "statutory national policy" of "expanding and enhancing the use of alternative dispute resolution," such as indemnification agreements.[11] The Eleventh Circuit ignored this policy by refusing to enforce the indemnification provisions. As with arbitration agreements, indemnification agreements should be construed broadly in order to deter baseless claims and fulfill the national policy recognized in the Civil Justice Reform Act:

> The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or in the allegation of waiver, delay, or a like defense to arbitrability.

Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983) (citations omitted).

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[11] As set forth *supra*, Chairman Biden explained that the Civil Justice Reform Act is necessary "to establish a *statutory national policy* for addressing the problems of litigation costs and delay . . . ." S. Rep. No. 416, 101st Cong., 2d Sess. 31 (1990) (emphasis added). One of the cornerstones of the act is "expanding and enhancing the use of alternative dispute resolution." *Id.* at 14. Indemnification, as a "disincentive to litigate," is a form of alternative dispute resolution, which includes "all the penalties and cost assessment devices that can be applied against a party who chooses to litigate." Frances E. Zollers, *Alternative Dispute Resolution and Product Liability Reform*, 26 Am. Bus. L.J. 479, 487-88 (1988).

CONCLUSION

For the reasons stated herein, petitioner PaineWebber Incorporated requests that a writ of certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,
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